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2002-LHC-02563

OWCP NOS.: 01-147150
01-147377
01-148787
01-143510

In the Matter of

NANCY E. ROSS
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

and

AIG CLAIM SERVICES, INC./BIRMINGHAM FIRE INSURANCE COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

James W. Case (McTeague, Higbee & Case),
Topsham, Maine, for the Claimant

Stephen Hessert (Norman, Hanson & DeTroy),
Portland, Maine for the Employer/Self-Insured

Nelson J. Larkins (Preti, Flaherty, Beliveau, Pachios & Haley),
Portland, Maine, for AIG Claim Service/Birmingham Fire Insurance

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from claims for worker's compensation benefits filed by Nancy E. Ross (the "Claimant") against the Bath Iron Works Corporation ("BIW") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. ("LHWCA" or the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before the undersigned administrative law judge in Portland, Maine on December 12, 2002 and January 15, 2003.

The Claimant appeared at the hearing represented by counsel, and appearances were made on behalf of BIW in its capacity as a self-insurer and on behalf of AIG Claim Service/Birmingham Fire Insurance ("Birmingham Fire") which provided workers' compensation insurance coverage to BIW during a portion of the Claimant's employment. The hearing afforded all parties an opportunity to present evidence and oral argument. The Claimant and two witnesses called by BIW testified at the hearing, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-38, BIW Exhibits ("EX") 1-55 and Birmingham Fire Exhibits ("BX") 1-33. Hearing Transcript ("TR") 10-12, 160-163, 206, 249. As discussed below, the record was held open at the close of the hearing for BIW to offer an affidavit from the Claimant's former supervisor and, in response to BIW's post-hearing evidence, the Claimant offered her own affidavit to which BIW objects. Thereafter, all parties were allowed to file written closing argument, and the record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that the Claimant has established entitlement to an award of disability compensation subject to a credit for compensation payments made under a state act, interest on underpaid compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Evidentiary Issue

The Claimant and her former supervisor at BIW, Michael W. Morris, both testified on the first day of the hearing on December 12, 2002 regarding the Claimant's duties and work location at the time of the May 10, 1999 injury. The Claimant was recalled when the hearing reconvened on January 15, 2003, and she testified regarding additional duties that she neglected to describe during her initial testimony. TR 166. Since BIW did not anticipate this additional testimony, Mr. Morris was not present, and BIW was granted leave, without objection from the Claimant or Birmingham Fire, to offer a post-hearing affidavit from Mr. Morris addressing the additional duties described by the Claimant on the second hearing day. TR 310. As discussed above, BIW

has offered a post-hearing affidavit from Mr. Morris, responding to specific testimony elicited from the Claimant at the hearing on January 15, 2003. No objection to this affidavit has been raised, and I have admitted it into evidence as EX 56.

While the Claimant did not object to the post-hearing affidavit from Mr. Morris, she has offered her own post-hearing affidavit in which she responds to the Morris affidavit. BIW objects to the admission of this affidavit on the ground that no provision was made at the hearing for any post-hearing testimony other than the limited Morris affidavit. Upon review, I find that the Morris affidavit diverges from the Claimant's testimony with regard to minor, non-material details. Moreover, to the extent that there are any inconsistencies between the Claimant's testimony and Mr. Morris's statements, I have credited the Claimant's version as more detailed and reliable. Consequently, BIW's objection is sustained as I find that the Claimant's rebuttal affidavit is cumulative in nature and properly excluded as exceeding the limited scope of post-hearing evidentiary development requested and allowed at the close of the hearing.

III. Findings of Fact and Conclusions of Law

A. Stipulations and Issues Presented

There are four claims asserted in this matter based on four separate injuries which the Claimant alleges that she sustained while employed by BIW – namely, (1) a respiratory injury on October 10, 1986, (2) a respiratory injury on January 28, 1997, (3) multiple traumatic injuries on January 25, 1998, and (4) a back and neck injury on May 10, 1999. The parties agree that the October 10, 1986 injury is the responsibility of Birmingham Fire based on the dates that it provided liability coverage to BIW under the LHWCA, and BIW agrees that the other alleged injuries all are its responsibility as a self-insurer. TR 15-16.

With respect to the October 10, 1986 injury, Birmingham Fire and the Claimant stipulated that: (1) the claim arising from that injury comes within the jurisdiction of the LHWCA; (2) there was an employer-employee relationship between BIW and the Claimant at the time of this injury; (3) all notices and claims were timely filed; and (4) compensation and medical benefits were paid under the state compensation act. TR 21-22. With respect to the subsequent injuries, BIW and the Claimant stipulated that: (1) there was an employer-employee relationship between BIW and the Claimant at the time of all of the alleged injuries; (2) the Claimant sustained an injury to her back on May 10, 1999 which arose out of and in the course of her employment at BIW; (3) the average weekly wage at the time of the January 28, 1997 injury was $666.93; (4) the average weekly wage at the time of the May 10, 1999 injury was $691.46 as determined by a State of Maine Workers' Compensation Commission hearing officer; (5) an incident occurred on January 25, 1998; (6) the Claimant gave timely notice of all of the alleged injuries to BIW; and (7) the claims and notices of controversion were timely filed. TR 16-17, 20-22.

The Claimant is seeking an award of permanent total disability compensation for three periods -- May 10, 1999 to May 12, 2001, September 24, 2001 to May 18, 2002 and October 5, 2002 to the present and continuing, and two periods of permanent partial disability compensation

-- May 13, 2001 to September 23, 2001 and May 19, 2002 to October 4, 2002. Claimant's Brief at 2. She also seeks an award of medical benefits and attorney's fees. *Id.* In addition to the threshold evidentiary issue regarding the admissibility of the Claimant's post-hearing affidavit, Birmingham Fire and BIW assert several defenses to these claims.

Specifically, Birmingham Fire raises the following issues: (1) whether the findings of the State of Maine Workers' Compensation Commission are binding on Birmingham Fire; (2) whether the Claimant's alleged disability is causally related to the October 10, 1986 respiratory injury for which Birminghan Fire is the responsible carrier or whether intervening medical conditions are responsible; (3) the nature and extent of the Claimant's disability; and (4) whether Birmingham Fire is entitled to Special Fund relief pursuant to section 8(f) of the LHWCA. Birmingham Fire Brief at 1-2.

For its part, BIW contends that Birmingham Fire is responsible for the Claimant's pulmonary problems and pulmonary restrictions as a result of the October 10, 1986 injury and that there was no subsequent intervening injury which served to aggravate or accelerate the Claimant's underlying pulmonary condition on anything other than a brief, temporary basis. BIW Brief at 2-3. BIW admits that injuries or incidents occurred on January 25, 1998 and May 10, 1999, but it asserts that the January 25, 1998 incident did not have any permanent or lasting effect upon the Claimant and that the May 10, 1999 injury falls outside the jurisdiction of the LHWCA because the Claimant lacked maritime status at the time that she was injured. *Id.* at 3. BIW additionally contends that the determination of the State Workers' Compensation Commission that the Claimant is partially, rather than totally, disabled as a result of the May 10, 1999 injury is binding on the parties by virtue of the doctrine of *res judicata*. *Id.* Finally, BIW argues that if its other defenses are rejected and the merits of the claims are reached, the Claimant has not demonstrated any incapacity as a result of the May 10, 1999 injury. *Id.*

B. Background

The Claimant, who was 52 years old at the time of the hearing, graduated from high school and worked as steam presser in a garment factory before she was hired by BIW in 1974 as a welder. TR 29-31. She denied any injuries prior to 1974 and stated that she was in good health when she went to work at BIW. TR 30-31.

At BIW, the Claimant was trained in the welding trade and, after passing a test, she was assigned as a welder on the "panel line." TR 31. While working as a welder, she developed shortness of breath and a persistent cough and sought treatment from her family doctor who advised her to get out of the work area. TR 31-32. She then informed her supervisor at BIW that she had to resign her welding position because of her health, and she left BIW after about three months on the job. TR 32.

After leaving BIW, the Claimant worked for about a year in a convenience store and for several years as a tire and battery changer at a Sears store. TR 32-33. She then returned to BIW as a laborer in the paint shop in May 1980. TR 33. She testified that her health was good when she returned to BIW, and she denied any problems with her back, neck or breathing aside from the problem she encountered while welding at BIW in 1974. TR 33. She also said that the

breathing problems cleared up after she left BIW and that she did not seek any further respiratory treatment between 1974 and 1980. TR 34. As a paint department laborer, the Claimant was assigned to work on "conversion ships" where she performed fire watch, grinding, and paint preparation duties. TR 34. She later advanced to the painting trade which involved work with paints, solvents and epoxies as well as use of a "needle gun" to grind off old material. TR 35. Although she wore a face mask, she testified that it did not fit properly, allowing her to inhale dust and fumes, and she eventually redeveloped shortness of breath and breathing problems. TR 35-36.

In July 1986, the Claimant reported her breathing problems to BIW's Industrial Health Department; TR 36; CX 21 at 175; and she was placed in a limited duty status with a restriction against grinding painted surfaces. CX 21 at 178-179. At this time, she was reclassified from the painter craft to a laborer position at a lower pay rate. CX 19 at 124. The Claimant was also seen by her family physician, Norman Rosenbaum, M.D., who wrote to BIW on October 9, 1986, recommending that she be transferred out of the paint department because of lung difficulties related to her work. CX 12. In February 1987, she was given permanent work restrictions of no exposure to paint fumes and no work in closed areas without good ventilation. CX 21 at 185. With these restrictions, she remained in the paint department but was reassigned to the "ways" where she used a wheelbarrow and shovel to remove grit produced by sandblasting operations. TR 37. The "ways" are wedge-shaped concrete structures on the riverbank where ships are constructed on blocks, and the Claimant's job involved removing the sandblast grit that collected on the ways beneath and around the ships being constructed. TR 38-39. The Claimant also performed other outdoor cleaning work around the ship production areas, and she remained on this assignment for the next ten years. TR 40-41. Her position was reclassified from laborer to preservation technician in August 1994 and again in October 1994 from preservation technician to maintenance custodian. CX 19 at 123.

In January 1997, the Claimant was assigned additional cleaning duties inside of production buildings where spray painting was being performed, lunchroom trailers, production bathrooms and sandblast trailers. TR 41. The Claimant testified that after assuming these inside cleaning responsibilities, she began to notice shortness of breath and a sensation "like an elephant sitting on my chest" which was similar to the symptoms that she developed in the past when working as a welder and working as a painter around paint fumes. TR 41-42. On January 28, 1997, the Claimant filed an injury report, stating that she was being exposed to epoxy fumes when walking past the spray paint building. CX 21 at 296. BIW's records reflect that the Claimant continued to complain of exposure to epoxy fumes, dust and welding fumes, and BIW made a series of efforts during January and February 1997 to modify her cleaning duties to reduce her exposure to these irritants. *Id.* at 297-308. On February 27, 1997, the Claimant was evaluated by a pulmonary specialist, Paul J. LaPrad, M.D., who diagnosed occupationally-induced asthma and recommended that she work in a clean air environment with proper ventilation. CX 8 at 33; TR 43. BIW then limited her to outside maintenance work. TR 43-44; CX 21 at 313.

The Claimant's duties as a maintenance worker included snow and ice removal during the winter months and mowing lawns, trimming, mulching, and general cleanup during warmer weather. TR 47-48, 52. Her work was performed primarily around the administrative buildings

at BIW's main shipyard, but she also performed cleanup work in the production areas on an "as needed" basis including the set up and removal of folding chairs for special events such as ship launches, removing recyclable paper and trash from the offices in production buildings, cleaning a pier next to a completed ship in preparation for loading of ammunition, cleaning up after a groundbreaking ceremony, cleaning around production areas in preparation for visit by the Undersecretary of the Navy, and cleaning women's bathrooms in production areas. TR 52-54, 167, 208-209. In addition, she performed a regular weekly assignment called the "burn bag detail" which required her to go into the production areas to collect classified documents for shredding. TR 167-168, 207-208. Because of her restriction against exposure to paint and fumes, she performed this detail at times when no painting activities were being conducted. TR 208.[1]

On January 25, 1998, the Claimant was assigned to remove snow and ice from crane rails on BIW's south pier. TR 47-48. The crane is used to lift large items on and off ships during the construction process. TR 48. As she was walking to the south pier, she tripped on a pipe that was jutting from a pallet and fell, landing on her left side and injuring her "neck, shoulder, elbow, knee, hip, the whole left side pretty much." TR 48-49; CX 21 at 327. Following this injury, the Claimant received physical therapy at BIW, and she continued to perform her regular duties without any restrictions related to the January 25, 1998 injuries. TR 51-52. However, she testified that she has experienced constant neck pain since this incident and that she still has difficulty moving her neck without pain. TR 50-51. The BIW Health Department records show that the Claimant reported continuing left shoulder and elbow pain when she was seen on March 2, 1998 and diagnosed with a left trapezius strain. CX 21 at 330-331. On March 13, 1998, her diagnosis was modified to multiple soft tissue pain including supraspinatus myalgia and probable bicep and quadriceps tendonitis, and she was referred to physical therapy. EX 47 at 163. On May 1, 1998, the Claimant reported after six weeks of physical therapy that her shoulder complaints were almost fully resolved, but she had continuing problems with her left knee. *Id.* at 159. As of May 29, 1998, the Claimant stated that she had some improvement in her left knee discomfort and was then working without restrictions. *Id.* at 158. On December 29, 1998, the Claimant stated in a note to the Employee Health Department that she had stopped therapy on her knee, that there was no change and that she would seek medical treatment if she encountered further problems. *Id.* at 157. There is no reference anywhere in the medical records to neck problems stemming from the January 25, 1998 fall, and the last mention of left shoulder problems was in May 1998.

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[1] The Claimant's description of her duties after 1997 is generally consistent with the testimony of her supervisor, Mr. Morris. He stated that he has supervised the Claimant since 1998 on the janitorial and grounds crew and that she has been classified since that time as a "MO-3" maintenance worker who is responsible for cleaning office space, production bathrooms, lunch rooms, grounds work and lawns, and snow removal from the crane rails. TR 118, 135-136. He also testified that BIW has a separate classification which is responsible for cleaning and maintenance work in production areas, and he stated that the Claimant was not assigned to work areas where she would be exposed to dust, fumes or paint because of her pulmonary restrictions. TR 117-118, 122. In his post-hearing affidavit, Mr. Morris agreed that the Claimant did collect burn bags, but he stated that she generally only collected the bags in outside areas and that she only went into the office areas of the production buildings. EX 56.

On May 10, 1999, the Claimant was assigned to mow, rake, trim and pull weeds from a lawn area which is situated between BIW's main office and the aluminum shop. TR 57. She testified that the grass was wet, making it difficult to control the lawnmower that she was operating on a slope and placing her in an awkward, twisting position that caused aching from the middle of her back into her feet. TR 57-58. She stated that she felt something "like a snap" and her neck also started aching. TR 58. She finished mowing the lawn despite her pain "because my boss was hounding me to get the job done" and then went to BIW's first aid facility where she received ice treatment and ibuprofen. TR 58-59. The Claimant was placed on light duty and referred to physical therapy, but she continued to report problems and was taken out of work on June 3, 1999 by BIW's nurse practitioner pending the results of a neurological consultation. EX 47 at 148-155. She has not returned to work at BIW since that time. TR 61. However, she testified that she has checked with BIW weekly for available work and that she has applied for clerical and security jobs there that were posted, but she has not been offered any work. TR 70-73.

Subsequent to the May 10, 1999 injury, the Claimant has looked for alternate employment in newspaper and Internet advertisements and through employment agencies. TR 169. She has also taken computer and keyboard courses in an effort to upgrade her skills. TR 214, 230, 244-246. She successfully secured a job in December 2000 as a night auditor at the Atrium Motel in Brunswick, Maine. TR 188-189. However, she testified that odors from the pool and caged birds in the motel caused her to suffer an asthma attack, and she quit after one day on her doctor's advice. TR 189-190. She also found part-time, seasonal employment as a summer gatekeeper at the Hermit Island Campground in Bath, Maine where she worked during the 2001 and 2002 summer seasons. TR 175-177. She worked five hour days, from 4:00 p.m. to 9:00 p.m. six days per week, earning $6.75 per hour, and she expected to return for the 2003 season. TR 177; CX 34. She has not been successful in finding any other employment.

The Claimant underwent a neurological evaluation on July 6, 1999 by William F. D'Angelo, M.D. CX 2 at 10. Dr. D'Angelo reviewed the results of a MRI which showed a ruptured disc at T8-9 with no spinal cord impingement, and he recommended a course of physical therapy in lieu of surgery. *Id.* at 11. He also recommended that she remain out of work pending further evaluation by Daniel Bradford, M.D. *Id.* at 18. Dr. D'Angelo reevaluated the Claimant on May 3, 2001, at which time he reported that the Claimant complained of continuing neck, thoracic and lumbar pain with right leg and left arm numbness. *Id.* at 20. He reviewed new MRI studies of the cervical, thoracic and lumbar spine, and he conducted a thorough neurological evaluation. He noted that the MRIs showed minor spondylosis at C6-7, a small osteophytic process or disc bulge at T8-9 "gently" compressing on the spinal cord, and degenerative disc disease of the lumbar spine without focal root compression. *Id.* Dr. D'Angelo stated that the Claimant's sensory examination "didn't make a lot of sense" and concluded that her reported sensory loss was not consistent with either a cord level or nerve root or peripheral nerve distribution. *Id.* He stated that there was nothing that he could offer in the way of surgical intervention, and he recommended a second neurological evaluation to "help clear the air" followed by a work capacity evaluation and chronic pain management. *Id.* at 20-21.

At the request of BIW, the Claimant was seen on September 2, 1999 for an evaluation by John Pier, M.D. EX 46. Dr. Pier reviewed the Claimant's history and medical records including the report of a functional capacity evaluation conducted, and he conducted a physical examination, concluding that the Claimant has a sedentary work capacity based on the results of her functional capacity evaluation and subjective pain complaints. *Id.* at 144-145.

After the Claimant stopped work as a result of the injury sustained on May 10, 1999, BIW initially paid her temporary total incapacity benefits under the Maine Workers' Compensation Act. In December 1999, BIW served the Claimant with notice that it intended to terminate these voluntary payments, and the Claimant filed a petition for review with the state Workers' Compensation Board. A hearing was held on May 23, 2000, and the Board's hearing officer issued her decree on October 5, 2000. *Ross v. Bath Iron Works Corp*., WCB No. 99-009178 (5-10-99); EX 20. One of the issues litigated was the availability of suitable alternative employment and the admissibility of certain evidence offered by the parties on this issue. On the admissibility issue, the hearing officer excluded work search documentation offered by the Claimant as not timely exchanged, and she overruled the Claimant's competence and hearsay objections to a labor market survey and deposition testimony offered by BIW from its vocational expert, Arthur Stevens. EX 20 at 20, 22. Although the hearing officer was not convinced by Mr. Stevens's opinion that the Claimant could earn between $6.50 and $8.50 per hour in entry-level positions, she did find that the Claimant is capable of earning the minimum wage working on a full-time basis. *Id.* at 22. Based on this finding, the hearing officer granted the Claimant's petition for review of the termination notice and awarded her partial incapacity benefits reflective of the difference between her average weekly wage and her earning capacity of $206.00 per week from full-time work at minimum wage. *Id.* at 23.

The Claimant filed a motion with the full Board seeking reconsideration of the hearing officer's earning capacity finding in light of her work search evidence, and the Board issued Findings of Fact and Conclusions of Law on December 28, 1999. EX 21. The Board found that the hearing officer's exclusion of the Claimant's work search evidence was partially in error as her initial work search documentation was timely exchanged while her supplemental documentation was not. *Id.* at 28-29. However, the Board nonetheless concluded that the Claimant's work search documentation was insufficient to establish entitlement to total incapacity benefits, and it declined to alter the hearing officer's award of partial incapacity compensation. *Id.* at 29.

C. Who is responsible for the Claimant's respiratory condition?

BIW and Birmingham Fire both deny liability for the Claimant's respiratory condition. As discussed above, the evidence shows that the Claimant first encountered respiratory problems in 1974 when she was undergoing training in the welding trade at BIW. She left BIW at this time and later returned to work at BIW as a painter. Twelve years after the 1974 episode, she again developed breathing problems in July 1986 while working as a painter. She was immediately removed from painting and grinding duties and was reclassified as a laborer which resulted in a change to a lower wage rate. One year later, she was placed on permanent restrictions of no exposure to paint and fumes and no work in closed areas without good ventilation. For the next ten years, she did outdoor cleaning work without any reported

incidents. However, in January 1997, she was assigned additional cleaning duties which brought her inside production buildings where she was exposed to fumes from spray painting operations. She testified that this exposure to fumes brought on symptoms which felt as though an elephant was sitting on her chest, and she filed an injury report with BIW. She was then diagnosed with occupational asthma by Dr. LaPrad, and BIW modified her duties to exclude any indoor maintenance work based on Dr. LaPrad's recommendation that she only work in a clean air environment. Unlike the situation in 1986, the changes in her duties did not result in any change in her classification or wage rate.

Birmingham Fire contends that these facts demonstrate that the Claimant did not have a continuing occupationally-induced asthmatic condition dating back to 1986, but rather that she suffers from an underlying asthmatic condition which originated in 1974 and which was temporarily aggravated by workplace conditions. While it acknowledges responsibility for the July 1986 exacerbation, Birmingham Fire asserts that this condition quickly abated after the Claimant's duties were changed and that the recurrence of pulmonary dysfunction over ten years later when the Claimant's duties were once again changed represents an aggravation of the pre-existing asthma for which BIW should be held liable. Birmingham Fire Brief at 3. On the other hand, BIW takes the position that there was no new injury on January 28, 1997 or, if there was an incident at that time, that it was simply a temporary flare-up of a pre-existing problem and did not serve to aggravate or accelerate the underlying pulmonary problem on anything other than a brief, temporary basis. BIW Brief at 8. BIW argues that its position is supported by the medical opinion of Dr. LaPrad who testified that the Claimant's "subsequent events are a manifestation of her primary diagnosis, that of asthma, rather than repeated new injuries." EX 29 at 56.

In cases involving occupational diseases arising within the jurisdiction of the Court of Appeals for the First Circuit,[2] "the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by an occupational disease arising naturally out of his employment and exposure is responsible for discharging the duties and obligations of the liable employer." *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co*., 978 F.2d 750, 756 (lst Cir.1992) (*Liberty Mutual*). Thus, "disablement is the critical factor in assigning carrier liability" and "the date on which a worker suffers a diminution of earning capacity is the date of disablement for purposes of assigning carrier liability. *Id.* at 756, 759. *See also Bath Iron Works Corp. v. Director, OWCP* (*Hutchins*), 244 F.3d 222, 229-230 (1st Cir. 2001). The record in this case establishes that the Claimant suffered a diminution of her earning capacity as a result of her occupational asthma in 1986 when she was transferred to a laborer position at a lower wage rate. There is no evidence that her earning capacity was impaired in any way by the episode of breathing difficulties in 1997 or by the subsequent modification of her duties. Therefore, I find that the "date of disablement" for purposes of assigning liability occurred in 1986 when Birmingham Fire insured BIW against workers' compensation claims. Accordingly, I conclude that Birmingham Fire continues to be the carrier liable for medical care due the Claimant as a result

[2] Asthma is an occupational disease. *Bustillo v. Southwest Marine, Inc*., 33 BRBS 15, 17 n.5 (1999).

of her occupational asthma.[3] I further conclude that Birmingham Fire is not liable for any compensation awarded to the Claimant for the claimed periods of disability subsequent to her May 10, 1999 injury because there is no evidence that her disability following the May 10, 1999 injury is causally related to her occupational asthma.

D. Is the Claimant's May 10, 1999 injury compensable under the LHWCA?

BIW contends that the Claimant's May 10, 1999 injury falls outside the jurisdiction of the LHWCA because the Claimant did not have maritime status at the time of the injury. BIW Brief at 13-16. It does, however, agree that the injury occurred on a maritime status covered by the LHWCA.[4] *Id.* at 14. Since there is no dispute that the periods of disability at issue in this case are causally related to the functional restrictions imposed on the Claimant as a result of the May 10, 1999 injury, the Claimant's entitlement to compensation payments under the LHWCA turns on the resolution of this jurisdictional issue. This is true whether the May 10, 1999 injury is characterized as a new injury or an aggravation of the January 25, 1998 injury as suggested by the Claimant because '[a]ggravation of a covered injury occurring after termination of covered longshore employment is not compensable under the Act." *Brown v. Bath Iron Works Corp*., 22 BRBS 384, 388 (1989).

The concept of maritime status is grounded in section 2(3) of the LHWCA which defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker" but not including specific categories of employment not relevant to the instant case. 33 U.S.C. § 902(3). In the case of workers who

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[3] This determination is not inconsistent with *Liberty Mutual* and *Hutchins*, both of which involved liability shifts to later carriers under the last injurious exposure rule, because there was no evidence in those cases that the claimants had become disabled at anytime while the earlier carriers were on the risk. Similarly, liability was shifted from an earlier to a later carrier in *Bath Iron Works Corp. v. Director, USDOL, OWCP* (*Jones*), 193 F.3d 27, 31-32 (1st Cir. 1999) because there was evidence of additional exposure to injurious stimuli and an aggravation of the claimant's occupational lung disease as well as a increase in the level of the claimant's disability from partial to total during the later carrier's coverage. Here, however, there is only evidence of additional injurious exposure unaccompanied by any worsening of the Claimant's condition or her level of disability which is insufficient under the case law to support transfer of liability from Birmingham Fire to BIW.

[4] To be compensable under the LHWCA, as amended in 1972, an injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).

are employed in occupations not expressly included or excluded from section 2(3)'s definition, "land-based activity will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Chesapeake and Ohio Railway Co. v. Schwalb*, 492 U.S. 40, 45 (1989). The injured workers in *Schwalb* were laborers at a railroad coal terminal who performed janitorial services, including the clearing of spilled coal from loading equipment, and a machinist who repaired coal loading equipment. 492 U.S. at 42-43. They were all injured while performing duties related to the maintenance and repair of the coal loading equipment. In holding that all three workers had maritime status under the LHWCA, the Court stated,

> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

493 U.S. at 47. *Schwalb's* "integral and essential" test is equally applicable to injuries occurring on land-based shipbuilding and repair facilities. *See, e.g., Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146, 147-148 (1999) (affirming as rational ALJ's finding that contract janitor who cleaned and restocked restrooms aboard ships and in production buildings fell short of being an integral part of shipbuilding or repair).

The injury sustained by the Claimant on May 10, 1999 injury presents an issue not directly answered by *Schwalb* – whether a land-based shipyard worker who is not employed in an occupation specifically included in section 2(3)'s definition of an employee, must be engaged in the performance of duties that are an integral part of and essential to the loading, unloading, building or repair of vessels at the time of the injury in order to invoke coverage of the LHWCA. If this question is answered in the affirmative, the Claimant's attempt to bring her May 10, 1999 within the coverage of the LHWCA must fail because there is no doubt that her lawn mowing activities on May 10, 1999 fail to pass the integral and essential test just as the contract janitor's restroom duties in *Gonzalez* fell short of being an integral part of the shipbuilding and repair process. That is, there is no evidence in the record which remotely supports an inference that the Claimant's failure to maintain lawn areas would in any way impede BIW's shipbuilding or any other maritime activities. Similarly, the Claimant's collection of burn bags appears to lack a sufficient nexus to the building or loading of ships to constitute integral and essential work. *Jernigan v. Newport News Shipbuilding and Dry Dock Co*, BRB No. 99-0884 (May 23, 2000) (unpublished) (ALJ rationally found that recycling and shredding paper at a shipyard not integral

or essential work). At the same time, the record shows that the Claimant performed other duties, albeit not at the time that she was injured on May 10, 1999, which I find to be indisputably essential to the shipbuilding and loading processes such as clearing snow and ice from the crane rails and clearing dock areas in preparation for the loading of ordnance onto ships. *See Watkins v. Newport News Shipbuilding and Dry Dock Co*., 36 BRBS 21, 23 (2002) (ALJ failed to draw the "inference mandated by *Schwalb*" that claimant's failure to perform her job of removing trash barrels containing shipbuilding debris from production areas would impede shipbuilding); *Ruffin v. Newport News Shipbuilding and Dry Dock Co*., 36 BRBS 52, 54-55 (2002) (worker who removed shipbuilding debris from production areas has maritime status). While no direct evidence was presented to establish that shipbuilding or loading work would be impeded at BIW had the Claimant not cleared snow and ice from the crane rails or debris from the piers, I find it rational to infer from the record facts that the cranes and piers are used in shipbuilding and loading that the Claimant's failure to perform her cleaning and maintenance duties would eventually interfere with, if not prevent the continuation of, maritime activities. *See Graziano v. General Dynamics Corp*., 663 F.2d 340, 343 (1980) (coverage found where failure to perform maintenance duties would not immediately, but eventually, lead to a stoppage or curtailment of shipbuilding and repair);[5] *Sumler v. Newport News Shipbuilding and Dry Dock Co*., 36 BRBS 97, 102 (2002) (work is considered essential if failure to perform it would "eventually" impede operation of equipment that is integral to the shipbuilding process).

The question of whether the Claimant should be denied coverage under the LHWCA because she was performing a non-maritime task at the moment of injury is resolved by *Shives v. CSX Transportation*, 151 F.3d 164, 169 (4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998) where the Court held that "the status inquiry focuses on the assigned occupational duties of the employee, and coverage is not denied simply because the employee was not performing a maritime function at the time of his injury." The Court also recognized in *Shives* that "[u]ndoubtedly, there is a level of longshore work assigned to an employee that may be so *de minimis* as to defeat coverage." 151 F.3d at 170 (italics in original). However, I find that the Claimant's clearing of the crane rails and piers were not so isolated and episodic as to be considered *de minimis*. *See Boudloche v. Howard Trucking Co*., Inc., 632 F.2d 1346, 1347 (5th Cir.1980) (employee who spent only 2.5 to 5 percent of his work time performing longshore duties was engaged in maritime employment since he spent at least some time in undisputedly longshoring operations); *Howard v. Rebel Well Serv*., 632 F.2d 1348, 1350 (5th Cir.1980) (rejecting a "substantial" time test for determining status and holding that a worker who spent less than ten percent of his time sandblasting maritime equipment was engaged in maritime employment). In my view, treating the Claimant's May 10, 1999 injury as covered by the LHWCA is not only consistent with the "broad and . . . expansive view of coverage" expressed by the 1972 amendments; *Graziano* at 342; it promotes the objective of more predictable and consistent administration reflected in the 1972 amendments by eliminating "shifting and fortuitous coverage." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274 (1977). In deed as Justice Blackmun observed in his concurring opinion in *Schwalb*, "to suggest that a worker . . . who spends part of his time maintaining or repairing loading equipment, and part of

[5] *Graziano* was decided prior to *Schwalb* but utilized a "necessary link in the chain of work that resulted in ships being built and repaired" status analysis that is substantially identical to *Schwalb's* "integral and essential" test. 663 F.2d at 343.

his time on other tasks . . ., is covered only if he is injured while engaged in the former kind of work, would bring the 'walking in and out of coverage' problem back with a vengeance." 492 U.S. at 50. Therefore, I find that the Claimant, by virtue of her occupation which included indisputably maritime duties that she performed on more than a momentary, episodic or incidental basis, was a covered employee within the meaning of section 2(3) at the time of the May 10, 1999 injury. *See Zeringue v. McDermott, Inc*., 32 BRBS 275, 277-278 (1998) (injured worker whose primary duties were non-maritime met the status requirement since he "participated in indisputably maritime activities, load-out operations, as part of his regular duty assignments, even though he did not participate in every load-out and the load-outs occurred infrequently, because claimant's participation in the load-outs was more than episodic, momentary, or incidental to non-maritime work.").

E. Does the Maine Workers' Compensation Board's decision have collateral estoppel effect?

Findings of fact made by the Maine Workers' Compensation Board are entitled to preclusive effect in subsequent litigation of a claim brought under the LHWCA, provided that there are not differences in the burdens of proof, such as where the victorious party in the state proceeding carries a heavier burden on the issue under the LHWCA, and there are not different legal standards which would undermine the policy considerations underpinning the collateral estoppel doctrine – avoidance of duplicative litigation. *Bath Iron Works Corp. v. Director, OWCP (Acord)*, 125 F.3d 18, 21-22 (1st Cir. 1997). BIW argues that the Maine Board's findings that the labor market evidence established that the Claimant has an earning capacity and that the Claimant's evidence was insufficient to establish that she had made a good faith, but unsuccessful, work search should preclude the Claimant from litigating the same issues in the instant proceeding, noting that the same evidence was presented at the state hearing and that there has been no showing of any change in circumstances. BIW Brief at 16. The Claimant counters that collateral estoppel is not applicable to preclude litigation of the issue of whether her disability is total or partial because the Board has held that an employer's burden of establishing the availability of suitable alternative employment is greater under the LHWCA than under the state act, while a claimant's burden of establishing an inability to perform any work is lighter under the LHWCA. Claimant's Brief at 11-13. The Claimant prevails on this point. As she correctly states, the Board has specifically considered the burdens relating to suitable alternative employment under Maine law and concluded,

> The state law requires the employer to show initially only that the claimant is no longer physically totally disabled and has acquired an earning capacity based, in most cases, solely on medical evidence. *See, e.g., Warren*, 424 A.2d at 712. Similarly, the administrative law judge found the state and Longshore Acts substantially the same because the employer first must show the claimant's ability to return to work. This burden under state law, however, is not comparable to employer's burden under the Longshore Act. Once the claimant has shown his inability to return to his usual work under the Longshore Act, the burden shifts to the employer to establish the availability of suitable alternate employment. It is manifestly insufficient under the Longshore Act for the employer to show merely that the claimant has some capacity to work or that the claimant can perform

certain tasks. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84, 89 (CRT) (2d Cir. 1997). The employer must show the realistic availability of actual jobs that the claimant can perform in order to meet its burden of establishing the availability of suitable alternate employment under the Longshore Act. The United States Court of Appeals for the First Circuit has referred to this burden as requiring the "precise nature, terms, and availability of the job[s]." *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434, 24 BRBS 202, 208 (CRT) (1st Cir. 1991). The employer's initial burden under the state Act, that of coming forward with nothing more than medical evidence evincing an ability to work, therefore is significantly lighter than that required under the Longshore Act; rather, to meet its burden of establishing suitable alternate employment, employer must provide evidence of actual positions, either at its facility or on the open market, that claimant can perform, given his age, education, vocational background and physical restrictions. *See id.*

In addition, the state burden on the claimant is greater than that required under the Longshore Act. Under the Maine law, once employer establishes claimant's physical capacity to work, claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a larger partial disability award. Although a claimant under the Longshore Act bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, *see Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert denied*, 479 U.S. 826 (1986), this burden does not arise until employer's burden of establishing suitable alternate employment is satisfied. *Id.* The State Board found that claimant herein did not meet his burden of production on the work search issue. Under the Longshore Act, however, this burden would not arise in the absence of credited evidence of suitable alternate employment. *Id.* As employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act, and as claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the Longshore Act, we reverse the administrative law judge's finding that collateral estoppel effect must be given to the state determination. *Acord*, 125 F.3d at 18, 31 BRBS at 109 (CRT).

Plourde v. Bath Iron Works Corp., 34 BRBS 45, 47-48 (2000) (citations and quotation marks in original; footnotes omitted). *Plourde* is clearly dispositive of BIW's collateral estoppel defense, and the Board has indicated that it will continue to follow *Plourde's* holding. *See Cyr v. Bath Iron Works Corp*, BRB No. 01-0697 (May 24, 2002) (unpublished). Accordingly, I conclude that the Claimant is not precluded from litigating whether she is totally disabled as a result of the May 10, 1999 injury.

E. Is the Claimant totally or partially disabled?

The Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). Disability under the Act involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991).

1. Nature of Disability – Temporary or Permanent?

A disability is generally considered to be of permanent duration when the worker has reached a point of maximum medical improvement, and it is appropriate to find that maximum medical improvement has been reached where disability will be lengthy, indefinite in duration and lack a normal healing period. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in pertinent part sub nom Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2nd Cir. 1985). Two physicians, Douglas M. Pavlak, M.D. for the Claimant and Christopher R. Brigham, M.D. for BIW, evaluated the Claimant for permanent disability in 2001, and both concluded that she has a permanent impairment of her back as a result of the May 10, 1999 injury. CX 15; EX 33. In addition, a retrospective view of the medical evidence reveals that the Claimant's condition has remained essentially unchanged since she was seen by Dr. Pier on September 2, 1999. EX 46. Based on this evidence, I find that any disability suffered by the Claimant since September 1, 1999 has been permanent in nature.

2. Extent of Disability – Total or Partial?

Since it is undisputed that she is unable to return to the maintenance duties that she was performing at the time of her injury on May 10, 1999, the Claimant meets her initial burden of proving that she cannot return to her usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984); *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982). As the Board stated in *Plourde*, once a claimant establishes that she is unable to return to her usual pre-injury work, the burden shifts to the employer to show that there are actual jobs realistically available that the claimant can perform. 34 BRBS at 47, citing *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991). If BIW demonstrates that suitable alternative employment is available, the Claimant "can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment." *Legrow* at 434.

BIW has introduced a series of labor market surveys that were prepared by its vocational expert, Arthur Stevens, and Mr. Stevens testified at the hearing. In his surveys, Mr. Stevens identified several available jobs as a hotel/motel front desk clerk, receptionist and security/visitor control that are compatible with the Claimant's restrictions and comparable, in terms of physical demand and skills required, to the seasonal gate attendant work that the Claimant has successfully performed at Hermit Island since the May 10, 1999 injury. EX 28, 34, 35, 51; TR 271-288. Mr. Steven has many years of experience in placing disabled workers into jobs in the State of Maine, and I find that his labor market surveys and testimony are sufficient to satisfy BIW's burden of demonstrating that suitable alternative employment has been available to the Claimant since the May 10, 1999 injury. In response, the Claimant credibly testified that she has applied for hundreds of jobs in the categories identified by Mr. Stevens and, with the exception

of the jobs at the Atrium Motel and at Hermit Island, she has been unable to secure employment. TR 174-203; CX 35, 38. Based on this evidence, I find that the Claimant has convincingly rebutted BIW's showing of suitable alternative employment by establishing that she has made a diligent, yet unsuccessful, attempt to obtain the type of employment identified by Mr. Stevens. In making this finding, consideration was given to Mr. Stevens's testimony that the Claimant's work search could have been more effective if she had been less direct in disclosing the reasons for leaving BIW on employment applications because her candor draws unfavorable attention to her disabilities. TR 281-284.[6] However, I find that the Claimant's honest and accurate responses to questions on an employment application do not amount to a lack of diligence in seeking alternate employment. Consequently, I conclude that the Claimant is entitled to an award of total disability compensation for the periods of incapacity since the May 10, 1999 injury and partial disability compensation for the periods when she was able to work and earn wages that were less than her pre-injury average weekly wage.

F. What Benefits are due the Claimant?

1. Compensation

The Claimant is seeking an award of permanent total disability compensation for three periods -- May 10, 1999 to May 12, 2001, September 24, 2001 to May 18, 2002 and October 5, 2002 to the present and continuing, and two periods of permanent partial disability compensation when she was engaged in seasonal employment of Hermit's Island -- May 13, 2001 to September 23, 2001 and May 19, 2002 to October 4, 2002. Claimant's Brief at 2. The record shows that the Claimant was placed on light duty following the May 10, 1999 injury and that she did not begin to suffer any wage loss until June 3, 1999 when she was taken out of work by BIW's nurse practitioner. EX 47 at 148-155. Therefore, I find that she is entitled to an award of temporary total disability compensation from June 3, 1999 through August 31, 1999 at a rate equal to 66 2/3 of the stipulated average weekly wage for the May 10, 1999 injury ($691.46) which equates to $460.97 per week. 33 U.S.C. § 908(b). For the periods of September 1, 1999 to May 12, 2001, September 24, 2001 to May 18, 2002 and October 5, 2002 to the present and continuing, the Claimant is entitled to permanent total disability compensation payments at the base 66 2/3 compensation rate of $460.97 per week. 33 U.S.C. § 908(a). The Claimant's permanent total disability compensation shall be subject to annual adjustments payable pursuant to section 10(f) of the LHWCA. 33 U.S.C. § 910(f). Lastly, for the periods of permanent partial disability compensation, when the Claimant was employed in seasonal employment at Hermit's Island,

[6] Mr. Stevens noted that the Claimant had answered questions employment applications asking her to state her reasons for leaving BIW by writing, "I am presently out on workers' compensation." TR 282. Mr. Stevens testified that this statement draws attention to the fact that the Claimant is injured, and he said that he counsels his clients to respond to such questions less directly: "I think the reason for leaving could be that she could no longer do the heavy work or, you know that the environment because of her respiratory issue. No harm in talking about what it is if you present it in a positive manner as you can." TR 283-282. There is no evidence in the record that the Claimant has been counseled by Mr. Stevens or anyone else as to how to use greater finesse in completing employment applications.

I find that the Claimant is entitled to compensation pursuant to section 8(c)(21) of the LHWCA at the rate of $325.97 per week which is equal to 66 2/3 of the difference between the stipulated average weekly wage and the wage-earning capacity of $202.50 per week (30 hours per week x $6.75 per hour) established by seasonal employment. 33 U.S.C. § 908(c)(21).[7]

2. Interest

I find that the Claimant is entitled to interest to the extent that she has not received timely the payments of disability compensation ordered herein. *See Foundation Constructors v. Dir.*, OWCP, 950 F.2d 621, 625 (9th Cir. 1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 as of the filing date of this Decision and Order with the District Director.

3. Credits

The record establishes that BIW has paid the Claimant incapacity compensation on account of the May 10, 1999 injury under the Maine Workers' Compensation Act. Section 3(e) of the LHWCA provides in pertinent part that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act." 33 U.S.C. § 903(e). Thus, under section 3(e), an "employer's payment of worker's compensation under a state statute discharges the employer's liability *pro tanto* under the Longshore Act." *Reich v. Bath Iron Works Corp*., 42 F.3d 74, 76 (1st Cir. 1994). Accordingly, I find that the BIW is entitled to a credit in the amount of its compensation payments under the Maine Act.

4. Medical Care

A party found liable for the payment of compensation is additionally responsible pursuant to Section 7(a) of the LHWCA for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). As discussed above, Birmingham Fire remains liable for all reasonable medical care that is necessary for the Claimant's work-related respiratory condition, and BIW is liable for all medical care that is reasonable and necessary for the Claimant's work-related May 10, 1999 back injury.

5. Attorney's Fees

[7] In the event that the Claimant returned to the Hermit's Island job for the 2003 and 2004 seasons, or if she has obtained any other employment subsequent to the closing of the record, the parties should be able to agree to an appropriate permanent partial disability compensation rate within the guidelines provided by this decision.

Finally, I find that the Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA because he has successfully established his right to additional compensation. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). His attorney has filed an itemized application for attorney's fees and costs for work performed before the Office of Administrative Law Judges in the amount of $27,912.13. Although BIW and Birmingham Fire have not responded to the fee application, I will not treat their silence as a waiver of any objection since the record shows that fee application was submitted as an attachment to the post-hearing brief and not in a separate motion for fees. Therefore, BIW and Birmingham Fire will be granted leave upon service of this decision to file any objection to the fees requested.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) Bath Iron Works Corporation shall pay to the Claimant Nancy E. Ross temporary total disability compensation pursuant to 33 U.S.C. § 908(b) at the rate of $460.97 per week from June 3, 1999 through August 31, 1999;

(2) Bath Iron Works Corporation shall pay to the Claimant Nancy E. Ross permanent total disability compensation pursuant to 33 U.S.C. § 908(a) at the base rate of $460.97 per week, plus the applicable annual adjustments provided in 33 U.S.C. § 910(f), from September 1, 1999 to May 12, 2001, September 24, 2001 to May 18, 2002 and October 5, 2002 to the present and continuing until further order;

(3) Bath Iron Works Corporation shall pay to the Claimant Nancy E. Ross permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(21) at the rate of $325.97 per week from May 13, 2001 through September 23, 2001 and from May 19, 2002 through October 4, 2002;

(4) Bath Iron Works Corporation shall pay to the Claimant Nancy E. Ross interest on any past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid;

(5) Bath Iron Works Corporation shall be allowed a credit pursuant to 33 U.S.C. § 903(e) in the amount of the compensation paid to the Claimant under the Maine Workers' Compensation Act since May 10, 1999;

(6) AIG Claim Services, Inc./Birmingham Fire Insurance Company shall continue to provide the Claimant Nancy E. Ross with such reasonable medical care as is necessary for her occupational asthma pursuant to 33 U.S.C. § 907;

(7) Bath Iron Works Corporation shall provide the Claimant Nancy E. Ross with such reasonable medical care as is necessary for her May 10, 1999 back injury pursuant to 33 U.S.C. § 907;

(8) Bath Iron Works Corporation and AIG Claim Services, Inc./Birmingham Fire Insurance Company shall be allowed 15 days from the date this decision and order is filed in the Office of the District Director to file any objection to the fee application filed by the Claimant's attorney in this matter; and

(9) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts